

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Lucila Martinez-Vivanco,

Case No. 23-cv-1853 (WMW/DLM)

Petitioner,

v.

ORDERWarden, *FCI Waseca*,Defendant.

Before the Court is Petitioner Lucila Martinez-Vivanco's "Motion to Expediate and Rule on Appeal Immed[i]ately," (Dkt. 12), and her application to proceed *in forma pauperis* ("IFP") on appeal, (Dkt. 16). For the reasons addressed below, the motion titled "Motion to Expediate and Rule on Appeal Immed[i]ately" is denied and the application to proceed IFP on appeal is granted.

I. Motion for Reconsideration

Martinez-Vivanco filed a motion titled "Motion to Expediate and Rule on Appeal Immed[i]ately." (Dkt. 12.) In liberally interpreting Martinez-Vivanco's *pro se* motion, the Court concludes that Martinez-Vivanco moves the Court to reconsider the Court's September 26, 2023. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (A document filed *pro se* is "to be liberally construed"). A party is not permitted to file a motion to reconsider without first obtaining the district court's permission based on a showing of "compelling circumstances." LR 7.1(j). "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Hagerman*

v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir. 1988) (internal quotation marks omitted). The purpose of a motion to reconsider is to afford a party the “opportunity for relief in extraordinary circumstances.” *Clear Channel Outdoor, Inc. v. City of Saint Paul*, 642 F. Supp. 2d 902, 909 (D. Minn. 2009) (internal quotation marks omitted). The decision to grant a party leave to file a motion to reconsider rests within the district court’s discretion. *Hagerman*, 839 F.2d at 413.

Martinez-Vivanco contends that “compelling circumstances” warrant a motion to reconsider because the Court committed a manifest error of law by not considering her petition. United States Magistrate Judge Douglas L. Micko issued a Report and Recommendation (“R&R”), recommending that this matter be dismissed as duplicative. Martinez-Vivanco was provided a period to object to the R&R, but she did not do so. After conducting a review for clear error, the Court adopted the R&R on September 26, 2023. Martinez-Vivanco does not argue that the R&R was incorrect, nor does she provide any reason for her lack of an objection to the R&R. The Court, therefore, concludes that “compelling circumstances” do not exist that warrant reconsideration.

II. Application to Proceed *In Forma Pauperis* on Appeal

Martinez-Vivanco has applied to proceed *in forma pauperis* on appeal. This Court concludes that Martinez-Vivanco qualifies financially for IFP status and as a prisoner with “no assets and no means by which to pay [an] initial partial filing fee.” 28 U.S.C. § 1915(b)(4). Although the Court continues to believe that Martinez-Vivanco’s action was correctly dismissed, the Court concludes that her appeal is not frivolous as the U.S. Supreme Court has defined that term. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989)

(stating that an appeal “is frivolous when it lacks an arguable basis either in law or in fact”).

Accordingly, Martinez-Vivanco’s IFP application is granted.

Based on the foregoing analysis and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Petitioner Lucila Martinez-Vivanco’s “Motion to Expediate and Rule on Appeal Immed[i]ately,” (Dkt. 12), is **DENIED**.

2. The application to proceed *in forma pauperis* on appeal of Petitioner Lucila Martinez-Vivanco, (Dkt. 16), is **GRANTED**.

3. The initial partial filing fee of \$90.86 for the appeal in this matter is due immediately.

4. Martinez-Vivanco is required to pay the remaining balance of \$414.14, the statutory filing fee prescribed by 28 U.S.C. § 1915(b)(2), and the Clerk of Court is ordered to provide notice of this requirement to authorities at the institution where Martinez-Vivanco is confined.

Dated: December 12, 2023

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge